IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C3 of 2017

BETWEEN:

THE QUEEN
Appellant

and

AARON JAMES HOLLIDAY
Respondent

**RESPONDENT'S SUBMISSIONS**

**Part I: PUBLICATION**

1. The respondent certifies that this submission is in a form suitable for publication on the internet.

**Part II: ISSUES**

2. The respondent accepts that the issues contended for by the appellant arise in this appeal.

**Part III: SECTION 78B**

3. The respondent considers that notice pursuant to s 78B of the Judiciary Act 1903 (Cth) is not required.

**Part IV: MATERIAL FACTS**

4. The statement of material facts set out in the appellant's narrative of facts and chronology is not contested.

Filed on behalf of the Respondent
The Respondent's solicitor is: Pappas j – attorney, Solicitors
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**Part V: APPLICABLE PROVISIONS**

5. The respondent agrees with the list of applicable statutory provisions specified by the appellant. However, some additional provisions are extracted in an annexure to these submissions.

**Part VI: ARGUMENT**

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*Prosecution reliance on s 45(1)*

6. In the present case, it was alleged that the respondent "committed the offence of incitement in that he urged" DP "to kidnap" JT and TJ. However, the offence of kidnapping may be committed in at least two ways under the ACT Code. It may be committed pursuant to s 38 *Crimes Act 1900* (ACT):

> Kidnapping
> A person who leads, takes or entices away or detains a person with intent to hold that
20 person for ransom or for any other advantage to any person is guilty of an offence punishable, on conviction, by—
> (a) if that other person suffers any grievous bodily harm while being so led, taken or enticed away, or detained—imprisonment for 20 years; or
> (b) in any other case—imprisonment for 15 years.

This may be described as a "substantive offence" of kidnapping. In the present case, the prosecution did not advance a case that the respondent urged a person to perpetrate the substantive offence of kidnapping. The prosecution did not allege that the appellant "intended [DP] to commit the kidnapping" (see Murrell CJ at [5]). Rather, the prosecution
30 relied on the operation of s 45(1) of the ACT Criminal Code ("the ACT Code") to

particularise its case on the basis that it was alleged that the appellant urged DP "to procure other people or other persons to commit the offence" of kidnapping. Pursuant to s 45(1), DP would be "taken to have committed" the offence of kidnapping if he procured the commission of kidnapping by someone else (in these submissions, that person is referred to as the "perpetrator" of the substantive offence). The prosecution case was that the appellant urged DP to kidnap JT and TJ on the basis that DP would, as a matter of law, himself commit the offence of kidnapping if he procured a perpetrator to kidnap JT and TJ.

*The interpretation of the ACT Criminal Code*

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7. The provisions of the ACT Code that are applicable in this appeal are derived from, and largely identical with, provisions in Chapter 2 of the Commonwealth Criminal Code ("the Commonwealth Code"). Given that, it is appropriate to begin with a consideration of the relevant provisions of the latter Code.

8. The proper approach to the interpretation of Chapter 2 in the Commonwealth Code and the process leading up to the enactment of Chapter 2 is detailed in *R v LK, R v RK* (2010) 241 CLR 177 ("LK"), Gummow, Hayne, Crennan, Kiefel and Bell JJ at 219 [96] – 224 [107]. While that discussion was primarily concerned with the conspiracy provision in s
20 11.5, much of the discussion is applicable to the present appeal. The proposition that expressions may be used that have an accepted legal meaning and that meaning may not be specifically set out in the Code (*LK* at 219-220 [96], 222-3 [102], 224 [107]) has particular application to the present appeal.

9. The term "urges" in s 11.4(1) in the Commonwealth Code and s 47(1) of the ACT Code is not defined. That expression, found in the clause "urges the commission of an offence", should be understood as fixed by the common law subject to express statutory modification.

10. Further, the discussion in *LK* at 230 [128] – 235 [141] of s 11.5 in the Commonwealth Code provides assistance in the proper construction of both s 11.4 in the Commonwealth Code and s 47 in the ACT Code. In particular, it supports the following conclusions:

(a) s 11.4(1) in the Commonwealth Code and s 47(1) of the ACT Code creates the offence of incitement;

(b) the physical element of conduct is specified in s 11.4(1) and s 47(1);

(c) intention is the default fault element for that physical element pursuant to s 5.6(1) in the Commonwealth Code and s 22(1) in the ACT Code;

(d) s 11.4(2), (2A), (3), (4) (4A), (5) are epexegetical of what it is to urge the commission of an offence within the meaning of s 11.4(1) and s 47(2), (3), (4), (5), (6) are epexegetical of what it is to urge the commission of an offence within the meaning of s 47(1).

*Incitement to procure an offence under the pre-existing law*

11. The appellant refers to the pre-existing law in relation to the offence of incitement at AS [17]-[18]. The common law in respect of the offence of incitement is that the conduct incited must amount to a criminal offence on the part of the person incited. Thus, it is not incitement for a man to solicit an underage girl to have sexual intercourse with him since, if he succeeded, he would have committed a criminal offence but she would not: *R v Whitehouse* (1977) 65 Cr App R 33, [1977] 2 WLR 925.

12. It is for this reason that the offence of incitement under the pre-existing law could not be committed on the basis of inciting a person to "aid, abet, counsel, or procure" the commission of an offence by a perpetrator (at least unless the perpetrator committed the offence). Accessorial liability is derivative. A person does not commit an offence on the

basis of accessorial principles unless the perpetrator committed the offence (Higgins (1801) 2 East 18, 102 ER 269 at 275; Surujpaul [1958] 3 All ER 300; *Jackson v Horne* (1965) 114 CLR 82, Barwick CJ at 88, Kitto J at 91, Taylor J at 94, Menzies J at 95; *R v Glennan* [1970] 91 WN (NSW) 609 at 615; *Giorgianni v The Queen* (1985) 156 CLR 473 at 491.

13. Leading English commentators have concluded that the better view is that the offence of incitement under the common law could not be committed on the basis of inciting a person to "aid, abet, counsel, or procure" the commission of an offence by a perpetrator: JC Smith, "Secondary participation and inchoate offences" in Tapper (ed): Crime, Proof and Punishment (Butterworths, London, 1981) 39-40, 44; Smith and Hogan, Criminal Law (12th ed, 2008) 444; Simester and Sullivan, Criminal Law Theory and Doctrine (2nd ed, 2003) 266. JC Smith wrote at 40:

> [I]ncitement of a person to do an act which, when done, is not a crime, cannot be incitement to commit a crime. Where both parties have the same guilty state of mind, it would be absurd that the inciter of an act should be guilty of an offence when the actual perpetrator of that very act is not guilty of any offence.

That is, if the "procurer" fails in the attempt to procure, the procurer is not guilty as an accessory. It would be "absurd" for the inciter of the procurer to be guilty in such circumstances. The England and Wales Law Commission, in Report No 177, Criminal Law: A Criminal Code for England and Wales (1989) concluded at 3.19 that "incitement of another to aid, abet, counsel or procure (in other words, to make himself an accessory to) the commission of an offence by a third person is not an offence known to the law". It was because of this view of the law that the England and Wales Law Commission subsequently recommended changing the law to impose liability even if the substantive offence is not committed: England and Wales, Law Commission, Inchoate Liability for Assisting and Encouraging Crime, Report 300 (2006) at 3.42-3.43, 7.6(1). It was influenced in that view by the existence under the common law of an offence of incitement to incite (at 7.11-7.12. 7.17-7.18). Sections 44-49 of the *Serious Crime Act 2007* (Eng) were enacted as a result.

However, it was acknowledged that even these statutory changes would still leave a "gap" where "D encourages or assists P to *procure* X to commit an offence which X does not commit" (footnote 22 at p 104, emphasis in original).

14. The judgment of *Walsh v Sainsbury* (1925) 36 CLR 464 is referred to by the appellant at AS [18]. As noted there, the members of the High Court agreed that the appeal in respect of the O'Neill conviction should be allowed and the conviction quashed. However, only Isaacs J addressed the issue that arises in this appeal – whether an offence of inciting a person to be complicit in the commission of a substantive offence can be committed if the substantive offence is not committed. The O'Neill charge was that Walsh "did unlawfully incite" O'Neill "to counsel the Waterside Workers' Federation of Australia ... to do something in the nature of a strike contrary to the provisions of the Crimes Act 1914-1915" (36 CLR at 474). Section 7A of the *Crimes Act 1914* (Cth) provided:

> If any person:
> (a) incites to, urges, aids or encourages ...
> the commission of offences against any law of the Commonwealth ... he shall be guilty of an offence.

Isaacs J observed at 476 that, pursuant to s 7A, the offence is completed once the "incitement" or "urging" is proved. However, he then stated at 476.3:

> But to be itself an offence the "incitement" or the "urging" must be to the commission of some "offence".

With respect to the O'Neill charge, it was alleged that Walsh incited O'Neill "to counsel" a union to "strike". Section 6A of the *Conciliation and Arbitration Act 1920* (Cth) made it an offence for a person, in certain circumstances, to "do anything in the nature of a lock-out or strike". Isaacs J noted that s 5(1) of the *Crimes Act 1914* (Cth) provided:

> Any person who aids, abets, counsels, or procures, or by any act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against this Act or any other Act whether passed before or after the commencement of this Act, shall be deemed to have committed that offence and shall be punishable accordingly.

Isaacs J stated at 477.2:

> That section, construed in accordance with a long continued and consistent judicial and legislative view, is merely an "aiding and abetting" section. It creates no new offence. It does not operate unless and until the "offence"—which may be called, for convenience, the principal offence, though it really is the only substantive offence—has been committed. Then, and then only, does the section operate to make any person falling within the terms of the section a principal participating in that offence.

Isaacs J also held that an alternative provision where the word "counsel" occurred (s 87 of the *Conciliation and Arbitration Act 1920*) also did "not create a new and substantive offence". Accordingly, Isaacs J held at 478.7 that one of the issues in the O'Neill case was whether the union did "strike within the meaning of sec. 6A".

15. It follows that the judgment of Isaacs J is authority for the proposition that an offence of "urge" (or "incite") a person to "aid, abet, counsel, or procure" the commission of a substantive offence will only have been committed if the substantive offence has been committed by a perpetrator.

*The Gibbs Committee*

16. The Gibbs Committee Interim Report (July 1990) noted at [18.37] that the UK Law Commission had recommended against recognition of an offence of "incitement of another

to aid, abet, counsel or procure (in other words, to make himself an accessory to) the commission of an offence by a third person" for the following reason:

> The reason for this is that aiding and abetting is not in itself an offence. It attracts liability only on the commission of the substantive offence. Until that offence is committed the incitement is only to do acts which may or may not turn out to be criminal.

The Interim Report considered at [18.38]-[18.40] that this was not sufficient reason to recommend against recognition of an offence of incitement committed on such a basis, but it did not challenge the proposition that the incitement offence would not be committed until the perpetrator committed the substantive offence.

*The Model Criminal Code Officers Committee*

17. It was concluded in both the MCCOC July 1992 Discussion Draft and December 1992 Final Report that there should not be offences of "inciting to incite, inciting to conspire or inciting to attempt" (Discussion Draft at p 85 [404.4]; Final Report at p 95 [404.4]). However, in neither the MCCOC Discussion Draft or Final Report is there discussion of the question whether there should be an offence of incite to be complicit in an offence. The position taken by MCCOC is accordingly unclear.

18. It may be that the view was taken that it should be possible to commit an offence of incitement where the offence incited was only to be established on the basis of complicity (although the argument in support of the notice of contention below will contend to the contrary). However, there is no basis on which to conclude that the view was taken that it would be open to convict of incitement in such circumstances even if the perpetrator did not commit the substantive offence.

19. By expressly proposing that there should not be an offence of "incite to incite" (and not adopting the view that it should be possible to be guilty of incitement on the basis of accessorial principles unless the perpetrator committed the substantive offence) MCCOC placed appropriate limitations on the offence of incitement.

*"urges the commission of an offence"*

20. Section s 47(1) of the ACT Code creates the offence of incitement. It specifies the physical element of conduct. Intention is the default fault element for that physical element pursuant to s 22(1). In the present case, it was alleged that the respondent "committed the offence of incitement in that he urged" DP "to kidnap" JT and TJ. However, as noted above, the prosecution relied on the operation of s 45(1) of the ACT Criminal Code ("the ACT Code") to particularise its case on the basis that it was alleged that the appellant urged DP "to procure other people or other persons to commit the offence" of kidnapping. Pursuant to s 45(1), DP would be "taken to have committed" the offence of kidnapping if he procured the commission of kidnapping by someone else.

21. Section 45(3) provides that a person is "taken to have committed the offence ... by someone else", in this case kidnapping, pursuant to s 45(1), "only if the other person commits the offence" of kidnapping. That is, DP could not be taken to have committed the offence of kidnapping (and accordingly would not commit the offence of kidnapping), unless the other person (or persons) did commit the substantive offence of kidnapping under s 38 *Crimes Act 1900* (ACT). As under the pre-existing law, accessorial liability under the Code is derivative liability.

22. Consistent with pre-existing law, since a person cannot commit an offence on the basis of procuring the offence by a perpetrator unless the perpetrator commits the substantive offence, a person cannot urge the commission of the offence on the basis of inciting a person to procure the offence unless the substantive offence is committed. That is, since conduct to procure a substantive offence only attracts liability on the commission of the

offence by the perpetrator, until that offence is committed the incitement is only to engage in conduct which may or may not turn out to be criminal.

23. Putting the same proposition in different language, where A incites B to procure C to commit an offence, the incitement of B will only be *to attempt to* procure C - unless C is ultimately procured and proceeds to commit the offence. Just as it is not an offence for B to attempt to procure C to commit an offence (s 11.1(7) in the Commonwealth Code and s 44(10) in the ACT Code), so it is not an offence for A to incite B to attempt to procure C to commit an offence (s 11.4(5) in the Commonwealth Code and s 47(6) in the ACT Code).

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24. Equally, where A incites B to procure C to commit an offence, the incitement of B will only be *incite* C to commit the offence - unless C proceeds to commit the offence. Just as it is not an offence for A to incite B to incite C to commit an offence (s 11.4(5) in the Commonwealth Code and s 47(6) in the ACT Code), so it is not an offence for A to incite B to procure C to commit an offence, unless C proceeds to commit the offence.

*Section 47(5)*

25. Section 11.4(4) in the Commonwealth Code (along with s 11.4(2), (2A), (3), (4A) and
20 (5)) is epexegetical of what it is to urge the commission of an offence within the meaning of s 11.4(1). Equally, s 47(5) in the ACT Code (along with s 47(2), (3), (4) and (6)) is epexegetical of what it is to urge the commission of an offence within the meaning of s 47(1).

26. Wigney J was correct to hold at [109]-[114] that s 47(5) of the ACT Code provides that those provisions in the Code (particularly s 45(3)) which, like the pre-existing law, ensure that a person does not commit an offence on the basis of accessorial principles unless the perpetrator commits the offence, also apply to the offence of incitement. That is, where it is alleged that A urged the commission of an offence (here, kidnapping V) on the basis that
30 he urged B to procure C to kidnap V, where B would not commit the offence of kidnapping

V unless C did kidnap V then, equally, A would not commit the offence of incitement unless C did kidnap V. A provision in the Code (particularly s 45(3)) which ensures that a person does not commit an offence on the basis of accessorial principles unless the perpetrator did commit the offence is properly regarded as a "limitation or qualifying condition" applying to the offence (the offence of kidnapping where the offence is sought to be made out in reliance on s 45).

27. The appellant's argument at AS [40]-[42] is unpersuasive. No absurdities result from position taken by Wigney J. The appellant contends at AS [40]-[41] that Wigney J held that a person could be "charged" with incitement even if he could not be "convicted" because the substantive offence is not committed. That is a misreading of Wigney J at [85]-[86]. Wigney J at [85] held that urging a person to procure another person to commit an offence *is* an offence known to the law (and thus can be prosecuted under ACT law). However, Wigney J held at [86] that it would not be an offence unless the substantive offence was ultimately committed. The example at AS [41] second dot point is answered by a prosecution case that A incited B to either murder D himself or procure someone else to do it. The example at AS [41] third dot point is answered by recognition that A inciting B to procure C to murder D thereby incites B to procure C to inflict grievous bodily harm on D (to murder is to inflict grievous bodily harm).

28. The appellant's arguments regarding the words "limitation or qualifying provision" in s 47(5) should not be accepted:

(a) Neither Wigney J (nor Hodgson J in *R v Onuorah*) treated the words as a compound expression (see AS [44], [67]). Wigney J simply concluded that the condition in s 45(3) was either a "limitation" or a "qualifying provision". There was no need to decide which. Hodgson J simply observed at 76 NSWLR 11 [35] that the expressions "defence, limitation or qualifying provision" in s 11.1(6) of the Commonwealth Code "are apt to refer to matters extrinsic to the elements of the offence", a proposition that Wigney J at [113] did not dispute (nor does the

respondent). Plainly enough, s 45(3) is not an element of any offence. It is epexegetical of what it is to be complicit in the commission of an offence by someone else pursuant to s 45(1). The appellant does not suggest that s 45(3) should be regarded as an element of the offence.

(b) The appellant submits at AS [6] that the term "limitation" has a long history in the common law but then relies at AS [51] on authority in respect of the term "limitation *period*" to support the surprising submission that "limitation" in s 47(5) means "a temporal limitation". There is nothing in the history of the provision (and comparable provisions), either in the Gibbs Committee or MCCOC, to support that submission. The Gibbs Committee did give the examples of "time limits and consents to prosecution" (Interim Report at p 242 [18.49]) but these were stated to be examples of "procedural requirements" (that is, "procedure" in s 47(5)) rather than examples of a "limitation". In any event, s 47(5) includes both "defence" and "qualifying provision", neither of which were proposed by the Gibbs Committee.

(c) The appellant submits at AS [46] that the term "qualifying provision" has a long history in the common law but then states at AS [51] that the phrase "does not appear to have a direct analogue in the common law" before submitting that it should be given the same meaning as the word "qualification" as it appears in the entirely different context of s 58(3). The appellant appears to submit at AS [68] that a "qualifying provision" in s 47(5) is a "matter in the purview of the accused". The only argument advanced to support that construction relies on the meaning contended to be given to the word "qualification" in the evidential burden provision (matters in respect of which the accused bears an evidentiary onus). Again, there is nothing in the history of the provision (and comparable provisions), either in the Gibbs Committee or MCCOC, to support that submission. The Gibbs Committee did not propose either the term "qualifying provision" or "qualification" in its version of s 47(5) (Interim Report, cl 7B(6)) while it did propose the term "qualification" in its version of s 58(3) (Final Report, cl 7). MCCOC did use the

term "qualifying provisions" in both its Discussion Draft and Final Report version of s 47(5) (cl 404.3) while it used the term "qualification" in both its Discussion Draft and Final Report version of s 58(3) (respectively, cl 601.3 and cl 602.3). MCCOC did not explain why it proposed addition of the term "qualifying provisions" to what had been proposed by the Gibbs Committee (see Discussion Draft at p 73 and Final Report at p 83) but it certainly did not suggest any connection with the term "qualification" in its evidential burden provision. Equally, in the commentary on the evidential burden provision, there was no reference made to cl 401.5, cl 404.3 or cl 405.6.

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(d) The appellant submits at AS [58] and [70] that a "limitation or qualifying provision *applying to an offence*" in s 47(5) is limited to a "limitation or qualifying provision" that applies to the substantive offence of kidnapping. It is argued that it does not extend to a condition on a person being taken to have committed an offence pursuant to s 45(1). Again there is nothing in the history of the provision (and comparable provisions), either in the Gibbs Committee or MCCOC, to support that submission. The submission is inconsistent with the submission made by the appellant at AS [33] that incitement "of an offence" may be charged under s 47(1) "in circumstances where the person would, if he or she were to act in the manner

20 charged, be taken to have committed an offence by virtue of s 45(1)". The appellant does not explain why "an offence" in s 47(1) extends to circumstances where the offence is taken to have been committed pursuant to s 45 but "an offence" in s 47(5) does not. If "an offence" in s 47(1) applies to circumstances where the offence is taken to have been committed, then the same must be the case where "an offence" appears in s 47(5). In any event, s 45(3) does, properly analysed, apply to the offence of kidnapping – it is epexegetical of what it is to be complicit in the commission of an offence of kidnapping by someone else pursuant to s 45(1), with the result that the accomplice is taken to have committed the offence of kidnapping. It applies to the offence of kidnapping where the prosecution relies on the operation

of s 45(1) to establish that the conduct that was urged is deemed to be the offence of kidnapping.

(e) When MCCOC referred to "the special rules applicable to the completed offence" (Discussion Draft at p 73 and Final Report at p 83), that was in the context of the discussion of proposals relating to attempt. The "completed offence" was the offence attempted. That language does not support a conclusion that "an offence" in s 47(5) does not apply to circumstances where the offence is taken to have been committed.

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29. In conclusion, the present is a case where the Crown could only make the respondent liable for the offence of incitement by relying on s 45(1), which deems a person to have committed a substantive offence where the person "procures the commission" of that offence by another person. A condition for the operation of s 45(1) is that the substantive offence must have been committed. That condition is a "limitation or qualifying provision" applying to the substantive offence because it will not be committed (pursuant to s 45) unless that condition is satisfied. Accordingly, that condition also applies to the offence of incitement under s 47.

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**Part VII: ARGUMENT ON NOTICE OF CONTENTION**

30. If the respondent's argument that Wigney J was, in substance, correct is rejected, the respondent advances the argument that there is no offence under the ACT Code of incite the commission of an offence where the offence urged is "taken to have" been "committed" pursuant to s 45(1). That would be consistent with the view of the pre-existing law, articulated by the England and Wales Law Commission, in Report No 177 at 3.19 that "incitement of another to aid, abet, counsel or procure (in other words, to make himself an accessory to) the commission of an offence by a third person is not an offence known to the
30 law" – whether or not the substantive offence is committed by the perpetrator.

31. That is, the respondent contends that the words "urges the commission of an offence" in s 45(1) should be understood to apply only to a substantive offence, rather than an offence "taken to have" been "committed".

32. The Gibbs Committee Interim Report included a Draft Bill (Part IX) which, in cl 7B(1) provided for an offence of "incites another person to commit an offence ...". Clause 7B(5) provided

> In this section:
> 'offence' includes an offence under section 5.

Clause 5(1) in the Draft Bill provided that "[a] person who is knowingly concerned in the commission of an offence against a law of the Commonwealth is taken to have committed that offence and is punishable accordingly".

33. It is apparent that the Gibbs Committee considered (18.40, 18.53(f)) that, unless it were "made clear" that "an offence" that is incited includes an offence "taken to have" been committed, the incitement provision would not extend so far. For that reason, it was proposed ([45.4]) that there should not be an offence of conspire to commit an offence as an accessory and it was assumed that, in the absence of specifically including an offence under clause 5 in clause 7D, clause 7D would not have application in such circumstances.

34. No comparable provision to cl 7B(5) referencing the complicity provision is found in the MCCOC recommended provision (Discussion Draft at p 82; Final Report at p 92). This indicates that it was not intended that there be an offence of incite to be complicit in a substantive offence.

35. However, it is true that cl 401.6 as recommended by MCCOC in both the Discussion Draft and Final Report is somewhat inconsistent with this argument, since it was thought

appropriate to provide expressly that the attempt provision would not apply to an offence deemed to have been committed under complicity principles. Unfortunately, there is no commentary in either the Discussion Draft or the Final Report in relation to cl 401.6.

**Part VIII: ORAL ARGUMENT**

36. The respondent estimates that no more than two hours will be required to present his oral argument.

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Dated: 5 April 2017

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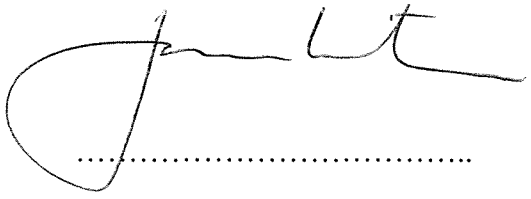

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